IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 7811 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE R.BALIA. and
MR.JUSTICE A.R.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes

2. To be referred to the Reporter or not? Yes

3. Whether Their Lordships wish to see the fair copy of the judgement? No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No

5. Whether it is to be circulated to the Civil Judge? No

SHREE THARAD JAIN YUVAK MANDAL& S.B. TAPAGACHHA SANGH TRUAT

Versus

INCOME TAX OFFICER

Appearance:

MR KA PUJ for Petitioner

MR P.G. DESAI for M/s. R.P. Bhatt & Co. for Respondents

CORAM : MR.JUSTICE R.BALIA. and
MR.JUSTICE A.R.DAVE

Date of decision: 08/04/99

ORAL JUDGEMENT (per R. Balia, J.)

Heard learned counsel for the parties.

2. The petitioner is a trust assessed to income tax in the status of Association of Persons. The petitioner filed return of income for A.Y. 1985-86 declaring gross

total income of Rs. 2,52,826 and deducting therefrom a sum of Rs. 1,50,785 being the expenses incurred on the objects of the trust as well as of capital nature. Out of the remaining balance of Rs. 1.02,041, the petitioner had transferred an amount of Rs. 90,000 to Upashraya Bhavan Fund Account which was an earmarked fund and claimed the said amount as exempt from income tax u/s 11(2) of the Act. The claim of the assessee was allowed. It appears that thereafter objection was raised by the audit informing the department that the trust has not obtained permission of the AO u/s 11(3A) of the Act and as such exemption u/s 12 should not have been allowed. The period for taking remedial action, on receiving audit objection, u/s 263, had expired and the concerned ITO and Deputy Commissioner, having not suggested action u/s 154, recourse to sec. 147 was suggested by the Dy. Commissioner of income-tax (Audit). That is apparent from Annexure-I appended to the petition which is a letter of the Audit Officer and Annexure-J which are the contents of the letter of Dy. CIT (Audit), Ahmedabad. In pursuance thereof, notice u/s 148 was issued initiating proceedings for reassessment on 2.1.91. The petitioner challenged that notice by Special Civil Application No. 1228/91. During the pendency of that proceeding, notice dated 2.1.91 was withdrawn and the court recorded in its order dated 11.3.91, while disposing of SCA No. 1228/91, that "the impugned notice is intended to be withdrawn with liberty to issue a fresh notice in accordance with law. In view of the fact that the impugned notice is intended to be withdrawn, the petitioner does not intend to press the present application by reserving right to take appropriate action if needed against the proposed notice.

3. Thereafter, the impugned notice was issued on 29.7.91 u/s 148 of the Act. On demand, reasons that have been recorded for assuming jurisdiction to initiate proceedings u/s 147 were supplied to the petitioner, which read as under:

> "During the previous year relevant to the A.Y. 1985-86 the assessee trust has transferred the amount of Rs. 3,23,817 from the Specific Fund Account known as Rajendra Suri Sevadhyay Mandir Makan Fund to the corpus fund of the trust. This amount was surplus of donations received for the purpose of construction of Rajendrasuri Mandir and the assessee claimed exemption u/s 122 r/w s. 2(24)(iia). The specific case for which the amount transferred to corpus is not on record. No directions from the donors for the diversion

of funds were obtained. The permission of ITO for diversion of donation from the one fund to another as required u/s 11(3A) also not obtained. The amount of Rs. 3,23,817 is therefore required to be taxed as the income of the trust. In the circumstances, the assessee has been allowed an excessive relief to the extent of Rs. 3,23,817. I have therefore reason to believe that the income to the extent of Rs. 3,23,817 has escaped assessment within the meaning of sec. 147 of the Act."

4. The learned counsel,amongst other grounds, urged that the impugned notice has been issued on 29.7.91 after expiry of 4 years from the end of the relevant A.Y. 1985-86. This being not a case where the reassessment is sought on the basis of failure on the part of the assessee to disclose truly and fully all material facts necessary for the assessment, the assumption of jurisdiction is beyond a period of limitation therefore cannot be sustained.

5. No reply has been filed. Learned counsel for the respondents has relied upon the reasons recorded in furtherance of his submission that satisfaction as to escapement of income from assessment has been bona fide reached on the basis of material before it, independent of the audit objection, by the A.O., and therefore, initiation of reassessment was justified.

6. We have given our anxious consideration to the contentions raised before us. It is undoubtedly true that where there is no failure on the part of the assessee to disclose truly and fully all material facts which are necessary for assessment, the AO cannot assume jurisdiction to initiate proceedings for assessment/reassessment of income for any assessment year beyond a period of 4 years from the end of the relevant assessment year in respect of which recourse to sec. 147 and 148 is taken.

7. Section 147, which provide for assessment or reassessment of income or recomputation of the loss or depreciation allowance, as the case may be, for any assessment year subject to provisions of secs. 148 to 153 to the extend relevant for present purposes read as under:

"147. If the Assessing Officer has reason to believe that any income chargeable to tax

has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned.

Provided that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year."

8. A perusal of the aforesaid provision goes to show that under proviso to section 147, the foundation of conferring jurisdiction on the AO to assess or reassess the income for any assessment year beyond the end of 4 years from the end of relevant assessment year must be omission or failure on the part of an assessee to make a return u/s 139 for any assessment year or to disclose fully and truly all material facts necessary for his assessment for that year and that the ITO has reason to believe that the income chargeable to tax has escaped assessment for that year. In the absence of any such omission or failure on the part of the assessee, taking action for assessment or reassessment is not permissible for any year after expiry of 4 years from the relevant assessment year.

9. The scope of assessee's duty to disclose fully and truly all material facts necessary for assessment in the context of the provisions of sec. 34 of the Indian

Income-tax Act, 1922 has been succinctly stated by the Supreme Court by Their Lordships in Calcutta Discount Co. Ltd. v. Income-tax Officer, Companies District I, Calcutta & Anr., 41 ITR 191. The court observed,

> "there can be no doubt that th duty of disclosing all the primary facts relevant to the decision of the question before the assessing authority lies on the assessee."

The Court further said,

> "Does the duty, however, extend beyond the full and truthful disclosure of all primary facts? In our opinion, the answer to this question must be in the negative. Once all the primary facts are before the assessing authority, he requires no further assistance by way of disclosure. It is for him to decide what inferences of facts can be reasonably drawn and what legal inferences have ultimately to be drawn. It is not for somebody else - far less the assessee - to tell the assessing authority what inferences, whether of facts or law, should be drawn.

Considering this, we find that the reasons which are required to be recorded in writing before issuance of notice and provide an opening to the window to the process of reasoning with which the AO comes to hold belief about the escapement of assessment of income and the reasons therefor are concerning transfer of an amount of Rs. 3,23,817 from a specific fund account known as Rajendrasuri Sevadhyay Mandir Makan Fund to the corpus fund of the trust. The claim of the assessee to exemption was u/s 12 r/w sec. 2(24)(iia). Specific purpose for which the amount transferred to corpus is not on record. Proposed disallowance of the assessee's claim to exemption is stated to be for reason that permission of ITO for diversion of donation from one fund to another as required u/s 11(3A) has not been obtained. From the document, Annexure-C, which is the letter dated 28th March 1990 written by the ITO to the CIT states, while narrating the gist of audit objection, the following excerpt is noticeable:

> "On verification of the record attached with the return of income revealed that the construction work of the Rajendrasuri Mandir has been completed and the surplus amount of Rs. 3,23,817 was transferred to the corpus fund of the trust and claimed exemption u/s 12 read with sec.

2(24)(iia) of the I.T. Act and was allowed treating the aforesaid amount as the corpus of the trust."

10. This clearly gives out that primary and material facts necessary for dealing with the said transfer of funds from one fund to another was disclosed to the AO during the course of assessment for A.Y. 1985-86. Exemption was claimed on that basis and exemption has been granted with reference to sec. 12 r/w 2(24)(iia). Thus, it was clearly a case where on primary facts having been disclosed, the AO has failed to draw legal inferences or to gather subsidiary material if at all required for the purpose of applying law and was a case falling within the province of proviso to sec. 147. That being so, the conclusion is inescapable that the notice issued on 29th July 1991 was beyond the expiry of 4 years from the end of relevant A.Y. 1985-86 which would end on 31.3.1986. The period for initiating proceedings under sec. 147 would expire on 31.3.1990.

11. Accordingly, the impugned notice is quashed. The petition is allowed. Rule is made absolute.

There shall be no order as to costs.

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